The Commission, however, asserts that the Court below invaded the area reserved exclusively for administrative determination. The Commission attempts to indicate a delicacy involved in such area with broad implications by pointing out that other Federal statutes provide for review of administrative action. Recognizing that there are limits upon authority to reverse upon judicial review of administrative action, it has never been held that a reviewing court cannot reverse where confiscation arises as a matter of law. The area of delicacy must arise in determinations of fact or determinations in which the agency is better qualified to decide technical questions involved. See Davis, *Administrative Law*, §248, pp. 893-897.

The reversal by the Court below cannot have an importance in "the delicate area of judicial review of administrative action". The Court laid bare a plain and fundamental error of law and having done so properly reversed the Commission's action. It is significant that the Commission in its petition here does not assert that the Court below erred in holding that the certificate condition was ineffective in the rate proceeding from the standpoint of substantial justice. The only challenge is to the asserted fact that the Court did not blind itself to the error of law.[5]

extraction operations as non-jurisdictional business except to the extent that such extraction is necessary to the preparation of gas for pipe line transportation.

[5] The Commission in its petition (fn. 8, p. 19) contends that the exclusion of the hydrocarbon expenses from the cost of service represented an appropriate "balancing of the investor and consumer interests". This, of course, does not answer the plain principle used by the Court below that there cannot be a confiscatory order. The Commission recites that during the pendency of the rate proceedings a public offering of Colorado's stock was oversubscribed. This, of course, is completely immaterial not only because the offer of stock was made prior to the rate determination but also because the reasonableness of the "end result" and the allowance of a proper return and legitimate expenses should not be governed by this isolated and unrelated instance.

2. *The question of excluding legitimate costs or reducing the return was before the Commission and the Court.* The deduction made by the Commission was a total amount of $878,202 made up of $421,537 of calculated loss and $456,665 of a computed income tax credit which the Commission claimed would inure to Colorado because of such loss (R. 115, 198). This total exclusion from Colorado's return on expenses was objected to on rehearing (R. 148-153, 169-174, 176-178) and also in its petition for review to the Tenth Circuit (R. 6-7). The lesser amount was objected to on the basis of the allocation adopted by the Commission. The larger amount, on account of the calculated income tax credit, was objected to as a reduction of return. Colorado even showed by a table of simple mathematical calculation (R. 177) that if income taxes were calculated on the orthodox basis (i. e., the taxes associated with the return allowed) that Colorado would be entitled to $642,264 as taxes, whereas the Commission allowed only $185,599 for Federal income taxes (R. 125). This allowance by the Commission when added to the asserted income tax credit of $456,665 gives the tax which should have been associated with the return. In its opinion following Colorado's petition for rehearing the Commission treated the calculated loss and the calculated income tax credit as both coming within the terms of the certificate condition (R. 197-198).[6] The treatment as a matter of principle therefore was before the Commission and the Court.

[6] The Commission stated the following:

"Colorado alleges that it has been deprived of the rate of return to which it is entitled by reason of our treatment of the loss on gasoline operations in computing income taxes. Colorado claims the federal income tax allowance is properly calculated at $642,264, whereas our allowance is $185,599, or a difference of $456,665. (Footnote continued, opposite page.)

SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 45

FEDERAL POWER COMMISSION,
Petitioner,

v.

COLORADO INTERSTATE GAS COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF OF COLORADO INTERSTATE GAS COMPANY IN OPPOSITION.

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In addition to the foregoing facts which show that the issue of a reduction in return on account of the certificate condition was before the Commission, the validity of that condition was argued before and considered by the Commission during the course of the certificate case, as set forth in the statement above (R. 643-644 fn. 2, 3). This fact of prior opportunity for consideration in itself satisfies any policy which might still remain requiring specification of errors. Any remaining limitation on review is required to give emphasis to a salutary policy of affording an agency the opportunity to consider on the merits those questions which will be urged on review. *National Labor Relations Board* v. *Cheney California Lumber Company*, 327 U. S. 385, 389 (1946); *Marshall Field & Company* v. *National Labor Relations Board*, 318 U. S. 253, 256 (1943); *Unemployment Compensation Commission* v. *Aragon*, 329 U. S. 143 (1946). These cases, along with others, have been cited by the Commission in support of its petition. The short answer is that the cases are inapplicable to the Commission's contentions because the policy announced in them has been satisfied here.

There is also cited on behalf of the Commission *Panhandle Eastern Pipe Line Company* v. *Federal Power Com-*

"The difference between the claimed income tax liability and the income tax allowance we provided is the result of our treatment of the loss on gasoline operations of $421,537. We have found that the loss on gasoline operations should not be considered a part of the cost of service and with this finding Colorado does not take issue. Colorado would have us compute its federal and state income tax liabilities on the basis of earnings which do not reflect a reduction in the cost of service of the $421,537. To accede to Colorado's contention, however, is to nullify the removal of the $421,537 from the costs which the customers of Colorado should bear. For under Colorado's claim the $421,537 denied it as recovery of a loss on gasoline operations would be recovered in substantial part from the customers in the guise of a reimbursement for a higher tax liability only part of which would in fact be incurred."

mission, 324 U. S. 635 (1945). That case did not involve a problem of reduction in return by the device of not allowing all properly incurred costs. Additionally, that case preceded the Administrative Procedure Act which enlarges a reviewing court's obligation to inspect the whole record. This enlarged power of a reviewing court is considered below.

The Commission also cites *United States* v. *Hancock Truck Lines, Inc.*, 324 U. S. 774 (1945). This case involved an acquiescence to a restriction of routes of a truck line in a certificate order. This again was not so fundamental as a disallowance of proper expenses resulting in a reduction of return. Acquiescence in the denial of fundamental or organic rights is without effect. *Southern Pacific Company* v. *Denton*, 146 U. S. 202 (1892).

The cases cited by the Commission did not have in them the peculiar applicable facts which are of importance here.

3. *The Court had authority to consider the effect of the deduction on the end result.* Colorado contends, as set forth above, that the Court had the authority which it exercised by reason of the fact that the question on exclusion of legitimate costs under the certificate condition was before the Court and had been urged before the Commission. This in itself would clothe the Court with the authority which it exercised.

Even if it be assumed that the point was not properly urged before the Commission and the Court, nevertheless there was authority to remand. The Commission concedes in its petition (p. 13) that a court of appeals has inherent power *vis a vis* district courts to consider and correct errors *sua sponte*. The Commission asserts, however, that it is different where a court of appeals is reviewing an order of an administrative agency properly before it when

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there is even a fundamental error of law amounting to confiscation. Bearing in mind that the Commission in its petition nowhere asserts that the deduction which the Court would not allow was proper, the assertion of the Commission is startling. The assertion of the Commission does not give proper effect to the Administrative Procedure Act. Under Section 10(e) of that Act (60 Stat. 237, 5 U. S. C. §1009(e)) it has been held (*Pittsburgh Steamship Company* v. *National Labor Relations Board*, 180 F. 2d 731 at 736, 737 (1950)) that:

> "The reviewing court is required to hold unlawful and set aside agency action, findings, and conclusions not in accordance with law and unsupported by substantial evidence, and in making its determination it is also required to review the whole record. These mandatory provisions define and make specific the requirements of judicial review and extend them beyond the requirements of the Wagner Act."

and further held:

> "We therefore proceed to inquire, upon a consideration of the whole record, whether the order sought to be enforced is supported by the reliable, probative, and substantial evidence and is in accordance with law."

The Commission would have a court vary this plain duty to review the whole record, even where the Court discerns confiscation, solely on the basis that the preamble to Section 10(e) explicitly provides that the review provisions there set forth are inapplicable where "statutes preclude judicial review". The Commission would have this Court believe that such preamble means that the limitation expressed in Section 19(b) of the Natural Gas Act (52 Stat.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 710.

FEDERAL POWER COMMISSION,

Petitioner,

v.

COLORADO INTERSTATE GAS COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF OF COLORADO INTERSTATE GAS COMPANY IN OPPOSITION.

Opinions Below.

The original opinion of the Court of Appeals (R. 593-610) is reported at 209 F. 2d 717; its opinion on rehearing (R. 630-633) is reported at 209 F. 2d 732. The opinion and order of the Federal Power Commission reducing rates (R. 77-140) are reported at 95 PUR(NS) 97.

Jurisdiction.

The original judgment of the Court of Appeals was entered on October 29, 1953 (R. 610). Pursuant to the Federal Power Commission's timely petition for rehearing, the Court of Appeals on December 8, 1953 vacated its

original judgment and granted rehearing (R. 621). The judgment on rehearing was entered on January 25, 1954 (R. 633). The jurisdiction of this Court has been invoked by Petitioner under 28 U. S. C. 1254(1), and Section 19(b) of the Natural Gas Act (15 U. S. C. §717r (b)).

Question Presented.

Whether, in a review of a rate reduction order entered under the Natural Gas Act, the Court below was foreclosed from considering the validity of a contingent rate condition, imposed in previously granting a certificate of convenience and necessity, which had the effect in the instant case of excluding certain expenses in determining the rates ordered by the Commission, when in such previous certificate proceeding the invalidity of that condition was urged and considered by the Commission, and when the Company on asking for rehearing of the instant rate order, and in its petition for review challenged the deduction on two bases: First, that the method of calculating the expenses was not supported by substantial evidence; and, second, that an associated deduction made by the Commission from allowed income taxes amounted to a confiscatory reduction of the cost of service.

Statutes Involved.

1. Section 19 of the Natural Gas Act (52 Stat. 821, 831, 15 U. S. C. 717r) provides in pertinent part:

> (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. * * *

No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing a written petition praying that the order of the Commission be modified or set aside in whole or in part. * * * No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. * * *

2. Section 10 of the Administrative Procedure Act (60 Stat. 237, 243, 5 U. S. C. §1009) provides in pertinent part:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion——

* * * * * *

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not

in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of the agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Statement.

Early in 1950 Colorado Interstate Gas Company and an affiliate (Canadian River Gas Company) requested the Commission to grant a certificate of convenience and necessity to merge, with Colorado as the surviving corporation then to operate properties of Canadian (R. 564). This merger was necessary to enable Colorado to finance the construction of needed facilities to meet growing public market demands. As consideration for the acquisition of the stock of Canadian, it was proposed that certain liquid hydrocarbon components of natural gas (generally referred to as "natural gasoline") in the gas reserves belonging to Canadian would be conveyed in place to a nominee of Canadian's parent. Colorado was to produce and gather these hydrocarbons in the stream of its gas destined for market and extract them. For this, Colorado was to receive 50% of the gross proceeds from the sale of such hydrocarbons (R. 554). It had been the practice of the Commission to credit to expenses the income derived from these liquid constituents in setting rates. Fear was

expressed by some interested parties that this 50% of gross would not compensate for the work which Colorado was obligated to perform and that any deficiency would be charged to rate payers. As a result, a proposal was first suggested by the City and County of Denver to which Colorado lent its assistance (R. 654-657) and resulted in a condition in the certificate order in the following terms (R. 566-567):

> "* * * if, as a result of carrying out the terms and conditions in the transaction proposed as a part of the acquisition and merger of Canadian into Colorado whereby rights to liquid hydrocarbons in place are granted to Southwestern Development Company and whereby Colorado is to receive 50% of the gross proceeds from the sale of certain liquid hydrocarbons and 15% of the net revenues to be received by Colorado from the hydrocarbons resulting from the operation of Fritch Natural Gasoline Plant of Texoma Natural Gas Company, the costs properly allocable to such hydrocarbons exceed the amounts payable to Colorado pursuant to such transaction, then and in that case in any proceeding in which the effective or proposed rates of Colorado are under inquiry such excess shall not be considered as a cost of service to Colorado's natural gas customers and consumers."[1]

In the course of the Commission's consideration of the certificate case, its counsel stated unequivocally that such a condition would not be enforceable (R. 643-644, fn. 3) and, in addition, in its deliberations the validity of such condition was considered by the Commission since a dissenting Commissioner stated:

> "* * * Should Colorado fail to earn a fair return in the future, then natural gasoline revenues given

[1] The opinions and order in this certificate case are fully reported in 10 FPC 105 (1951).

> up to Southwestern cannot be treated as revenues of Colorado. * * * I question seriously whether the stockholders of Colorado can be compelled to accept a confiscatory rate of return simply because of a condition inserted in a certificate by the Federal Power Commission and accepted by their present Board of Directors." (R. 643, fn. 2).

Subsequent to the issuance of this certificate, the Commission embarked upon hearings in a rate investigation against Colorado which was originally instituted in 1948. These rate proceedings resulted in an order adopted July 31, 1952 and issued August 8, 1952 directing Colorado to reduce its rates on sales for resale in interstate commerce by approximately $3,100,000 per year.[2] Reflected in this ordered reduction was $878,202 because of a loss which the Commission concluded came within the terms of the certificate condition. This $878,202 deduction from Colorado's return was made up of $421,537 which the Commission found to be the excess of expenses over income on the liquid hydrocarbon operations, plus an income tax credit on account of such expenses in the amount of $456,665 (R. 115, 198). Colorado had alleged as error in its petition for rehearing addressed to the Commission and in its petition for review to the Court below that such deduction should not be made. As to the $421,537 of the Commission-found loss, Colorado contended that there was not substantial evidence to support such finding (R. 6, 148-153, 169-174). As to the deduction of $456,665 on account of an alleged income tax credit, Colorado contended that such deduction was not within the terms of the certificate condition and amounted to a deduction from its allowed rate of return—reducing

[2] The petition for certiorari on behalf of the Commission states that this amount was about $2,703,000. The ordered reduction, however, was expressly found to be $3,100,000 (R. 139).

the return from 5½% purported to be allowed to an actual 5.10% (R. 6-7, 153, 176-178).

The Court below in the review proceeding instituted by Colorado pursuant to Section 19(b) of the Natural Gas Act (52 Stat. 821, 831, 15 U. S. C. §717r(b)) found that the Commission's method of determining the loss of $421,537 was supported by substantial evidence (R. 630-631). The Court did not expressly deal with the assertion of Petitioner that the alleged income tax credit made by the Commission under the certificate condition amounted to an invalid deduction from allowed return. The Court did, however, unanimously hold that the certificate condition was ineffective as a means of reducing the rate of return to which Colorado was found to be entitled.

The Commission petitioned for rehearing asserting that Colorado had not attacked the validity of the certificate condition. The Court granted rehearing (R. 621) and after full briefing and further argument reaffirmed its former position (R. 630-633). In its reaffirmance, the Court noted that Colorado did object to the exclusion of the asserted loss on hydrocarbon extraction operations. The Court also placed its treatment of the reduction of return upon its power to correct a fundamental error *sua sponte* and upon Section 10(e) of the Administrative Procedure Act which requires review of the whole record, as well as the Court's duty to determine whether the end result of the Commission's rate order was fair.

Argument.

1. *The Court made a simple and proper legal determination.* The Commission in its petition attempts to create an aura of broad importance and impact in its issue in the instant case which simply does not exist.

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831, 15 U. S. C. §717r(b)) precludes the review prescribed by the Administrative Procedure Act. This plainly is not the intent.

In the first place, a reading of that Section clearly indicates that there is a broader implication, *i.e.*, the review provision of the Administrative Procedure Act is not applicable if review in its entirety is withheld. The Senate Judiciary Committee recognized that: "the rule of review stated is that which is judicially recognized" (Sen. Com. Rep., Sen. Doc. No. 248, p. 36). Also, the Senate Judiciary Committee stated in regard to this limitation: "Very rarely do statutes withhold judicial review" (*Id.* p. 212). In the report of the House Judiciary Committee, it was stated under Section 10: "This section requires adequate, fair, effective, complete, and just determination of the rights of any person in properly invoked proceedings". (*Id.* p. 275). It is appropriate, therefore, to determine the Court's authority in the terms of "that which is judicially recognized".

Judicially it had been recognized prior to the enactment of the Administrative Procedure Act that there always are exceptional cases or circumstances which will prompt an appellate court to consider questions of law which were not pressed upon the court or the administrative agency below if injustice might otherwise result. *Hormel* v. *Helvering*, 312 U. S. 552, 557, 559 (1941). The effect of Section 10 of the Administrative Procedure Act would appear to give courts on review the same authority that such courts have *vis a vis* district courts where plain error on a question of law not involving administrative expertise is laid bare.

This authority of an appellate court in a case like the instant one is additionally fortified by the fact that since *Federal Power Commission, et al.* v. *Hope Natural Gas Company*, 320 U. S. 591 (1944), a reviewing court's concern

is with the "end result" of the rate determination. The obligation of a reviewing court in such a proceeding is to determine whether an order viewed in its entirety meets the requirements of the Natural Gas Act. The Court below discharged that obligation.

The Commission cites numerous cases in an attempt to support its petition. Most of these cases are not applicable here because the administrative agency in the instant case did consider the validity of the certificate condition. This distinguishing feature certainly applies to *National Labor Relations Board* v. *Cheney California Lumber Company*, 327 U. S. 385 (1946) and *Unemployment Compensation Commission* v. *Aragon*, 329 U. S. 143 (1946). Additionally, most cases cited antedate the Administrative Procedure Act. The Commission asserts, however, that the principle which it is striving to establish had been applied by this Court subsequent to the Administrative Procedure Act and cites *United States* v. *Tucker Truck Lines, Inc.*, 344 U. S. 33 (1952). *Tucker* is clearly distinguishable because there was involved in that case merely a procedural defect to which no objection was made in the administrative proceedings. As this Court recognized in *Tucker*, a procedural irregularity requires prompt objection to avoid waiver. The plain fact is that in instant case the Court below did not abuse its appellate or reviewing authority.

4. *There is no collateral attack upon the Commission's certificate determination.* The Commission in the last portion of its petition indicates that the Court below leaves the certificate standing without the condition and Colorado did not seek review of this certificate case. It is a well recognized doctrine that *res judicata* and estoppel do not apply to administrative proceedings. *Niagara Mohawk Power Corporation* v. *Federal Power Commission*, 202 F. 2d 190 (D. C.

Cir., 1952, affirmed 347 U. S. 239 (1954)). Additionally, the offending certificate condition probably could not have been made the subject of previous judicial review had Colorado been dissatisfied with it. The merger condition related to rates and did not of itself adversely immediately affect Colorado, but would affect the company only on the contingency of future administrative action, *i.e.*, a rate case. Review under such circumstances is premature. *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125, 130 (1939) and *Federal Power Commission* v. *Hope Natural Gas Company*, *supra*, at 619.

The Court below has done nothing but strike down the condition as an instrument for reducing the proper cost of service in this rate case. It has in no way attempted to affect the status of the Commission's issued certificate of convenience and necessity as was done in *Federal Power Commission* v. *Idaho Power Company*, 344 U. S. 17 (1952) which the Commission cites. The Commission is still free to do whatever it may under its certificate authority.

Conclusion.

The decision of the Court below is plainly correct to the extent the Commission has attacked it here. That Court discharged its duty upon review not only because the issue in principle was raised before the Commission, had previously been considered by the Commission, and was raised before the Court, but also because of the discharge of the Court's expanded review responsibility under the Administrative Procedure Act and the doctrine of the *Hope* case. It is, therefore, respectfully submitted that the petition for certiorari filed on behalf of the Commission should be denied as lacking in importance and substance. Also the

writ should be denied for failure to disclose or even assert error in the substantive determination below which prevents a confiscatory end result.

Respectfully submitted,

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